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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-607

ASSOCIATION OF MASSACHUSETTS CONSUMERS, INC.,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR BAY STATE GAS COMPANY IN OPPOSITION

DOUGLAS W. HAWES
J. MICHAEL PARISH
140 Broadway
New York, New York 10005

EUGENE R. FIDELL
1757 N Street, N.W.
Washington, D. C. 20036

Attorneys for
Bay State Gas Company

Of Counsel:
LEBOEUF, LAMB, LEIBY & MACRAE

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BRIEF FOR BAY STATE GAS COMPANY IN OPPOSITION

Bay State Gas Company ("Bay State"), an intervenor-respondent in the court below, respectfully urges that the petition for a writ of certiorari be denied for the reasons indicated in this Brief in Opposition.

QUESTIONS PRESENTED

1. Whether the Securities and Exchange Commission ("SEC") was required by the Public Utility Holding Company Act of 1935 ("the Act") to grant

the Association of Massachusetts Consumers ("AMC") a further hearing after AMC's contentions had been aired in a contemporaneous companion case which was settled by all parties including AMC.

2. Whether SEC approval of the divestiture in issue in this case was consonant with the purposes of the Act.

STATEMENT OF THE CASE

This case involves the divestiture of the gas utilities owned by the New England Electric System ("NEES"), pursuant to the Holding Company Act. The divestiture has already been before the Court on two occasions. Now, however, the Court's mandate has been fully complied with, and further review here would serve no purpose.

Following this Court's order in *SEC* v. *New England Electric System*, 390 U.S. 207 (1968) (*NEES II*), the SEC directed NEES to divest itself of its gas properties. There were eight such properties, which NEES divided into two groups of four, selling the four smaller companies first. Sale of the four smaller companies is not pertinent to this case. The second group of four included Lawrence Gas Company ("Lawrence"). Springfield Gas Light Company ("Springfield") was the successful bidder for Lawrence. Springfield was merged into its former subsidiary, Bay State, on whose behalf this brief is submitted. Boston Gas Company ("Boston Gas"), a subsidiary of Eastern Gas & Fuel Associates ("Eastern"), was the successful bidder for the other three companies.

After completion of the bidding, the SEC commenced proceedings with respect to the two sales of this second group of NEES gas properties. The Eastern proceed-

ing was noticed by the SEC on February 5, 1973. AMC sought and was granted leave to intervene in that proceeding on March 30, 1973.

The present case, involving the divestiture of Lawrence, was noticed by the SEC on March 14, 1973. Public Utility Holding Company Act Release ("HCAR") No. 17906 (March 14, 1973). On April 9, 1973, AMC requested leave to intervene in the Lawrence proceeding, urged that a hearing be held and asked that the Lawrence proceeding be consolidated with the Eastern proceeding. The reasons set forth in AMC's request for a hearing in the Lawrence case were identical with those contained in its petition to intervene in the Eastern proceeding before the SEC. NEES filed an answer on April 18, 1973 in opposition to AMC's request for intervention and a hearing in the Lawrence proceeding, to which AMC filed no reply. The SEC took AMC's requests under advisement pending the conclusion of the Eastern proceeding. HCAR No. 18254 (Jan. 11, 1974), at 4.

During the summer of 1973, a hearing was held in the Eastern case in which a record of more than 2,000 pages was developed, with the full participation of AMC. AMC subsequently withdrew from the Eastern proceeding pursuant to a settlement agreement dated August 17, 1973, in which Boston Gas agreed to certain limited restrictions on its future activities.

Determining that AMC's request disclosed no reason to hold a hearing as to the Lawrence divestiture, the agency entered an order approving the sale by NEES of its Lawrence shares to Springfield and denied a hearing and consolidation. The Lawrence sale was consummated on November 14, 1973 and Spring-

field was merged into its wholly-owned subsidiary, Bay State, on the same day, in accordance with the order of the Commission. On December 4, 1973, AMC filed a request for rehearing raising new issues which are the ones it primarily seeks to press on review in this Court, namely, the alleged anticompetitive effects of the divestiture and the applicability of Section 9(a)(2). The SEC denied rehearing and other relief requested on January 11, 1974. HCAR No. 18254 (Jan. 11, 1974).

On review, the District of Columbia Circuit, Rives, McGowan and Wilkey, JJ., affirmed. The court held that (1) the SEC's refusal to consolidate the Eastern and Lawrence proceedings was a sound exercise of discretion and (2) AMC had failed to state its contentions concerning the new issues raised in its motion for rehearing with the degree of specificity required by the SEC's Rules of Practice. The court also held (3) that NEES had made sufficient progress to satisfy the divestiture order even though it did not complete the process until after the two-year deadline in the order had expired. Finally, the Court of Appeals (4) found no error in the SEC's use of findings from the Eastern case in disposing of AMC's request for a hearing in the Lawrence proceeding, and (5) rejected AMC's hyper-technical contention that the essentially simultaneous merger of Springfield into the corporate predecessor of Bay State and its purchase of Lawrence gave rise to a requirement for SEC approval under Section 9(a)(2) of the Act. In passing, the lower court also rejected AMC's contention that the sale of Lawrence to Bay State was anticompetitive and therefore contravened the Act because Bay State had common directors and officers with other utilities.

As an appendix to the petition for certiorari, AMC has included a document dated October 1, 1975 (after the date of the decision of the court below) reproducing a resolution of the Massachusetts Consumers Council urging AMC to exhaust all available avenues of appeal "in order to force resolution of the public interest considerations involved in the creation of bigger and bigger utility combinations in Massachusetts." Passing over the irrelevance of this document, and the inappropriateness of its inclusion in the petition, *see* S.Ct.R. 40(5), its presence makes it particularly important for the Court to be aware of AMC's unexplained failure to exhaust the remedies that were clearly available to it under the law of Massachusetts.

The acquisition by Springfield of the interest in Lawrence formerly held by NEES, as well as the merger of Springfield into Bay State, required approval of the Massachusetts Department of Public Utilities ("the DPU") under Sections 17A, 96 and 99 of Chapter 164 of the General Laws of the Commonwealth of Massachusetts. Springfield, Bay State and Lawrence filed a joint application for such approval on July 5, 1973. After providing due notice by publication in local newspapers in the service areas of Springfield and Lawrence, the DPU conducted a public hearing on September 5, 1973. No representatives of AMC appeared or participated, although AMC representatives had been present as observers at the DPU's hearings on the acquisition of the three NEES utilities by Boston Gas. Evidence was presented by Springfield to show that the Lawrence acquisition and related mergers were in the public interest, including evidence showing that the rate structures of the three companies involved in the sale (Lawrence, Bay State,

and Springfield) were approximately equal and that the fear expressed by AMC in the Eastern proceeding, that Boston Gas' higher rates would be visited upon consumers in the service areas of the acquired companies, was not a valid consideration in the Lawrence proceeding.

Although AMC had notice of and opportunity to be heard in the DPU proceeding, it chose not to participate or even observe. In contrast, an individual representing consumer interests did appear and offered a statement which was received in the record. The Massachusetts statute (Ch. 164, § 96) gives the DPU power to reject a merger if it is not in the public interest, which was the gravamen of petitioner's claim below.

After the hearing, the DPU approved the transactions as consistent with the public interest. The DPU found that the results would include "more effective use of the gas supply and distribution capabilities," and "cost savings, operating efficiencies and service improvements." Mass. DPU Order No. 17726, at 6.[1]

The DPU's decision approving both the merger of Springfield into Bay State and the acquisition of Lawrence was the subject of an appeal by members of the public to the Supreme Judicial Court of Massachusetts. That appeal was commenced but not perfected. AMC again did not participate.

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[1] A supplemental petition was filed on November 5, 1973 for certain additions and revisions in the DPU order required because the Internal Revenue Service did not issue the requested ruling permitting tax-free treatment of the original plan to merge both Springfield and Lawrence into Bay State. After a further hearing, the DPU issued a supplemental order approving the modifications on November 13, 1973. As recast for tax purposes, approved and effected, the transaction did not provide for merger of Lawrence into the survivor of the Bay State-Springfield merger.

ARGUMENT

I.

The Decision Below and the Action of the SEC Were in Conformity with the Public Utility Holding Company Act of 1935.

This case involves the final stage of the divestiture of the gas utility holdings of NEES pursuant to Section 11 of the Act. 15 U.S.C. § 79k (1970).[2] In this part of the brief, we will show that the actions of the SEC and the court below were in full compliance with this Court's rulings in the two prior *NEES* cases,[3] and that the case is not one that calls for an exercise of the certiorari jurisdiction. We will also demonstrate that any delay by NEES in complying with the SEC's order requiring divestiture was not prejudicial to AMC. Finally, we will show that the SEC properly held that Springfield's acquisition of NEES' interest in Lawrence was not subject to SEC approval under Section 9(a)(2) of the Act. 15 U.S.C. § 79i(a)(2) (1970).

Little need be said concerning this Court's prior decisions in *NEES I* and *NEES II*. In the first of

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[2] A separate case, In re New England Elec. System, Civil No. 74-2466-M (D.Mass., filed July 1, 1974), was initiated by the SEC under Section 11(e) of the Act to "enforce and carry out the terms and provisions of" the divestiture plan. On September 15, 1975, the District Court, Murray, J., entered an order approving the plan. Counsel for all parties have agreed that the issues in the District of Massachusetts "do not relate to or conflict with" the issues here on review, and that "the interests of the minority shareholders of Lawrence Gas Company would not be affected by a decision rendered" in the instant case.

[3] SEC v. New England Elec. System, 384 U.S. 176 (1966) (*NEES I*); SEC v. New England Elec. System, 390 U.S. 207 (1968) (*NEES II*).

those cases the Court upheld the SEC's test for determining whether "loss of substantial economies" can be avoided by permitting a holding company to control a second integrated public utility system under Section 5 of the Act. 15 U.S.C. § 79e (1970). In the second case, the Court, following a remand to the First Circuit, upheld the SEC's divestiture order, finding that it was supported by the requisite "substantial evidence." *Id.* § 79x(a). The result was a final remand to the First Circuit with instructions to affirm the SEC's divestiture order. The Court of Appeals entered such an affirmance, and the order stood approved. All of the SEC's subsequent actions with regard to the divestiture of NEES' gas holdings have been pursuant to that litigation and consistent with this Court's decisions. Sale of NEES' interest in Lawrence was part of the plan submitted by NEES to the Commission. The decisions in *NEES I* and *NEES II* are by no means irrelevant to the case at bar, for they highlight the deference this Court has given to the SEC's expertise in the administration of the Act.

The Act requires, in Section 11(e), that divestiture orders be complied with in no more than two years. 15 U.S.C. § 79k(e) (1970). Here, admittedly, a longer period elapsed between the SEC's order and the submission of NEES' voluntary plan for divestiture, but the record is devoid of any evidence that AMC has been prejudiced thereby. AMC nevertheless has argued that the voluntary plan submitted by NEES should now be abandoned, and that the SEC should impose a plan under Section 11(d) of the Act. 15 U.S.C. § 79k (d) (1970). That argument was properly rejected by the court below, 516 F.2d at 716, on the basis of the

progress made by NEES within the statutory two-year period "and the Commission's satisfaction with the final plan." Plainly, a remand to compel the SEC to impose a plan under Section 11(d) that would accomplish the same purposes as the voluntary plan the Commission has already received and found satisfactory under Section 11(e) would be a case of "marching the king's men up the hill and then marching them down again . . . ." *City of Yonkers* v. *United States*, 320 U.S. 685, 694 (1944) (Frankfurter, J., dissenting). A remand for such a vain purpose hardly seems consistent with AMC's expressed concern over the amount of time the NEES divestiture has already consumed.

Moreover, as pointed out in *Phillips* v. *SEC*, 185 F.2d 746, 750 (D.C.Cir. 1950), treating the two-year period of Section 11(e) as "a trap closing down relentlessly . . . might well tend to cause the Commission to refrain from issuing any order in a particular case until the situation became ripe for complete and immediate enforcement." Hence, the rigid interpretation placed on Section 11(e) by AMC might, rather than stirring the SEC to more strenuous application of the Act, have precisely the opposite result.

Acting pursuant to Section 11(e) of the Act, 15 U.S.C. § 79k(e) (1970), the SEC approved the procedures utilized by NEES in disposing of its gas properties, including Lawrence. AMC argues, however, that the SEC was required to go further, and consider the merits of the overall transaction by which NEES' interest in Lawrence was sold to Springfield, and Springfield was merged into its subsidiary, Bay State. Such approval would only be necessary if the transaction were within the ambit of Section 9(a)(2) of the Act. 15 U.S.C. § 79i(a)(2) (1970).

Under Section 9(a)(2) the SEC must approve the purchase by any person (using jurisdictional means)[4] of "any security of any public-utility company, if such person is an affiliate," as defined in Section 2(a)(11)(A), of both the company whose shares are being purchased "and of any other public utility holding company, or will by virtue of such acquisition become such an affiliate." Procedures for approval are set forth in Section 10. 15 U.S.C. § 79j (1970). In the instant case, AMC contends that the acquisition of Lawrence by Springfield constituted an acquisition of the securities of Lawrence by a company which already had an "affiliate" and thereby obtained a second "affiliate," *id.* § 79b(a)(11)(A), triggering the approval requirement established by the initial clause of Section 9.

AMC's interpretation of Section 9(a)(2) ignores both the statutory purpose and the practical realities of the transaction. The SEC and the Court of Appeals took both into account.

The purpose of Section 9(a)(2) is to prevent any person from owning 5% or more of the voting securities of two or more public utility companies unless the ownership of such securities of the second and any additional affiliates has been found to comport with the public interest as set forth in Section 10 of the Act. That purpose is not contravened by the transaction here on review.

Reduced to its essentials, in this transaction, Springfield, a company with one statutory "affiliate" (Bay State), purchased NEES' interest in Lawrence, which thereupon became its "affiliate." As part of the same

[4] *I.e.*, "use of the mails or any means or instrumentality of interstate commerce."

transaction, Springfield and Bay State were merged, leaving no dual affiliation within the meaning of Section 9(a)(2). Viewing the transaction as a whole, Bay State emerged with the single affiliate permitted under the Act. Clearly, if Springfield had merged into Bay State a month, a week, or a day prior to the acquisition of the Lawrence shares, AMC could not have even argued that Section 9(a)(2) applied. The mere fact that the transaction was accomplished concurrently because of tax and business reasons does not provide a sound basis for the application of that provision.

Petitioners seek to freeze the transaction at an artificial time, in a vain attempt to show that Springfield was, for a *scintilla juris*, a statutory affiliate of both Lawrence and Bay State. The artificiality of this approach conflicts with the philosophy that underlies the Commission's "task of giving an intricate statutory scheme practical sense and application."[5]

In contrast, SEC's approach was a practical and realistic one: to look at the condition of the parties both before and after the transaction has been consummated. In this case, prior to the acquisition-and-merger, Bay State had one affiliate, Springfield, of which it was a wholly-owned subsidiary. Following the transaction, the NEES interest in Lawrence was held by Bay State, and Springfield had disappeared from the picture, having been merged into Bay State. In short, the only remaining statutory affiliate of Bay State was and is Lawrence. The substance of the transaction

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[5] SEC v. New England Elec. System, 384 U.S. 176, 184 (1966) (*NEES I*), *citing* Power Reactor Dev. Co. v. Int'l Union, Elec. Workers, 367 U.S. 396, 408 (1961); Philadelphia Co. v. SEC, 177 F.2d 720, 725 (D.C.Cir. 1941).

thus involves no proliferation of corporate tiers of the sort the Act was designed to prevent.[6]

As the court below observed, in expressly approving the SEC's analysis of this issue,

> In assessing interrelated corporate adjustments, comparison should be made of the situation just prior to and immediately following the adjustments. The sequence of relatively simultaneous corporate adjustments whose order has no practical effect do [sic] not govern the applicability of section 9(a)(2). 516 F.2d at 717.

Any other result would exalt form over substance, and would run counter to the policy expressed in *NEES I* and *NEES II* of deference to the SEC's judgments in matters within its area of expertise.

The petition also asserts that because there were common directors and officers among several utility companies including Bay State, Bay State's purchase of NEES' interest in Lawrence offended the principles of Section 10(b) of the Act. Petition at 8-9. This contention falls wide of the mark, for as noted by the court below, the "[e]limination of common officers and directors in noncompeting utility companies was not the precise purpose of the Act." 516 F.2d at 717.[7]

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[6] *See* S.Rep.No. 621, 74th Cong., 1st Sess. 31 (1935).

[7] Moreover, events have in large measure overtaken AMC's position. In response to a Federal Power Commission show cause order—an order that is not here on review but is reprinted in full as an Appendix to the Petition—three of the respondents have resigned one or more of their corporate posts, and the fourth has stated his intention to do so at the conclusion of his term of office in 1976. N.Y. Times, Oct. 4, 1975, at 33, col. 5 & 40, col. 8; Wall St. J., Oct. 6, 1975, at 15, col. 5.

AMC's case, then, reduces to its bald assertion that the battle for consumerism must be fought over the Lawrence divestiture. This claim has a hollow ring, given AMC's unexplained failure to exhaust the remedies that were available to it before the competent State agency. Since there is no conflict between the decision below and this Court's prior decisions in *NEES I* and *NEES II*, and no "special and important reasons" for review in this Court, S.Ct.R. 19(1), certiorari should be denied.

II.

The Petitioners Were Afforded a Full and Fair Hearing on Their Contentions in a Companion Adminsitrative Case

As may be seen from a review of the opinion of the Court of Appeals, the decision below rests in large measure on essentially procedural grounds involving the application of familiar doctrines of administrative law. The failure to show any prejudice from the treatment afforded AMC is, in our view, fatal to the petition for certiorari. AMC had an opportunity to ventilate its concerns in the Eastern proceeding. It did so (before joining in the settlement of that case), and cannot be heard now to complain that—in Judge Rives' words—it would have "tried harder" if it had known that that would be its only opportunity. 516 F.2d at 716. Moreover, the SEC's actions in refusing to order consolidation of the Lawrence and Eastern proceedings, and relying on the record made in the latter proceeding (to which AMC was a party) were plainly correct.

The denial of AMC's requests for a rehearing and consolidation may be treated summarily. Under established precedents, agency action of this nature may be upset only upon a clear showing of abuse of discre-

tion. *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 535 (1946) (denial of rehearing); *American Trucking Ass'ns* v. *United States*, 326 U.S. 77 (1945) (denial of consolidation); *City of San Antonio* v. *CAB*, 374 F.2d 326, 329 (D.C. Cir. 1967). AMC has made no showing that these aspects of the SEC's rulings suffered from such a defect.

The request for a hearing was also properly denied. As detailed by the court below, AMC's initial request was exceptionally vague. *See* 516 F.2d at 715. Despite the provision of the SEC's regulations requiring specificity of pleading, 17 C.F.R. § 201.9 (1975), AMC's submittal was an assortment of vague allegations. Although AMC's submittal did refer to the length of the NEES divestiture process and the fairness of the bidding procedures used by NEES for disposal of its holdings, there was no mention of anti-competitive effects or the need for approval under Section 9(a)(2) of the Act. In a document that accompanied the request for a hearing, AMC's president noted that the Lawrence proceeding raised "many of the same objections" as were raised in the Eastern proceeding. In its January 4, 1974 decision the Commission analyzed AMC's contentions from the Eastern case and concluded that none of them were pertinent to the Lawrence case. *See* Petition at 21a-23a. With respect to the Section 9(a)(2) and anti-competitive-effects contentions, the SEC, besides responding to the contentions on the merits, ruled that the former had not been raised in the original request for a hearing, and the latter had already been aired in the Eastern proceeding.

Those rulings, too, were correct. Certainly the SEC could properly demand adherence to reasonable plead-

ing requirements. *See, e.g., BPI* v. *AEC*, 502 F.2d 424 (D.C. Cir. 1974). Moreover, its reluctance to waive those requirements after the transaction had been effected in reliance on Commission approval of the plan, *see* Petition at 23a, was fair and reasonable under the circumstances.

AMC litigated the fairness of the bidding procedures used by NEES in disposing of that company's eight gas utilities. It received a full and fair hearing on that issue in the context of the companion Eastern case, to which it was a party. Although that case resulted in a settlement (in which AMC joined), a substantial record was developed and available to the SEC. The court below well stated the principle that obtains in such circumstances: "The Commission need not hold a hearing to gain information which has already been gathered." 516 F.2d at 716. *See also United States* v. *Pierce Auto Freight Lines, Inc., supra*, at 530. Manifestly, the fact that the SEC referred to a different docket in justifying its denial of a hearing was immaterial since AMC was a party to that proceeding, "offered evidence and had full opportunity to participate in the hearings." *Arizona Pub. Serv. Co.* v. *FPC*, 490 F.2d 783, 784 (D.C. Cir. 1974). To convene another hearing to consider the issue of anti-competitive effects of NEES' bidding procedures would have been an egregious misuse of agency resources, and a waste of the parties' time.

AMC thus received a hearing on its contention that NEES' procedures in dismantling its gas holdings were anti-competitive in the Eastern proceeding. As a result, the SEC properly denied its request for another hearing on the same issue in the Lawrence case (where the same NEES procedures were used). No

showing was made of a need for consolidation of the two cases, and, to the extent that the SEC refused to convene a hearing on any of AMC's other allegations, it was justified in doing so by AMC's failure both to state any relevant claims and to comply with the pleading requirements of the agency's Rules of Practice. As a result, there was no prejudice to AMC in the SEC's disposition of its requests.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DOUGLAS W. HAWES
J. MICHAEL PARISH
140 Broadway
New York, New York 10005

EUGENE R. FIDELL
1757 N Street, N.W.
Washington, D. C. 20036

Attorneys for
Bay State Gas Company

Of Counsel:
LEBOEUF, LAMB, LEIBY & MACRAE
November 21, 1975